Foreign Terrorist Fighters and Domestic Counter-Terrorist Measures: An Analysis of the Applicability of Japanese Legislation

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Abstract

Over 40,000 foreign individuals had reportedly traveled to Syria and Iraq as of late 2017 to fight alongside the terrorist forces(ISIS). The UN Security Council adopted Resolution 2178 to tackle the problem, calling on Member States to make these individuals(foreign terrorist fighters: FTFs) punishable through their internal laws and regulations. This article is intended to examine the possible applicability of specific Japanese legislation to the obligations flowing from the above resolution, concluding that the existing laws will be effective in the problem of FTFs to some degree.

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Introduction

On the morning of October 27, 2019 (precisely 9:20 AM EDT), then US President Donald Trump made the following announcement:

> Last night, the United States brought the world's number one terrorist leader to justice. Abu Bakr al-Baghdadi is dead. He was the founder and leader of ISIS, the most ruthless and violent terror organization anywhere in the world. The United States has been searching for Baghdadi for many years. Capturing or killing Baghdadi has been the top national security priority of my administration. US Special Operations Forces executed a dangerous and daring night time raid in north western Syria and accomplished their mission in grand style. The US personnel were incredible. I got to watch much of it.[1]

As mentioned above, ISIS (hereinafter, "IS")[2] has lost its central leadership—in addition to suffering multiple defeats, starting with the liberation by US forces in October 2017 of Raqqa, which had been the self-declared capital of IS's so-called "caliphate." It cannot be excluded, however, that IS or a similar kind of organization might be resurrected and have a tremendous impact on international peace and security on some future occasion.[3]

Incidentally, more than 40,000 foreign individuals had reportedly traveled to Syria and Iraq as of late 2017 to fight.[4] States of origin and states of transit undoubtedly had strong policy incentives to prevent the migration of these

[1] "Remarks by President Trump on the Death of ISIS Leader Abu Bakr al-Baghdadi," October 27, 2019, at https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-death-isis-leader-abu-bakr-al-baghdadi/.
Throughout this article, the date of the sites accessed is January 25, 2023.

[2] In October 2006, al-Qaeda in Iraq (AQI) publicly renamed itself the "Islamic State in Iraq." In 2013, it adopted the moniker "ISIS" to express its regional ambitions as it expanded its operations into Syria. United States Department of State, Bureau of Counterterrorism, *Country Reports on Terrorism 2018*, October 2019, p. 290, at https://www.state.gov/reports/country-reports-on-terrorism-2018/.

[3] For instance, it is noted that the "[I]slamic State in Iraq and the Levant (ISIL), following its loss of territory, has begun to reassert itself in both the Syrian Arab Republic and Iraq, mounting increasingly bold insurgent attacks, calling and planning for the breakout of ISIL fighters in detention facilities and exploiting weaknesses in the security environment of both countries." 1267 Committee, "Twenty-fifth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2368 (2017) concerning ISIL (Da'esh), Al-Qaida and associated individuals and entities," UN.Doc. S/2020/53 (January 20, 2020), p. 3.

[4] OSCE/ODIHR, "Guidelines for Addressing the Threats and Challenges of 'Foreign Terrorist Fighters' within a Human Rights Framework, " December 12, 2018, p. 11, at https://www.osce.org/odihr/393503?download=true.

individuals, because they were perceived as a major terrorist threat upon their return. As part of the response to the threat they posed, the United Nations Security Council (hereinafter, "UNSC") adopted Resolution 2178 on September 24, 2014, calling upon UN Member States, inter alia, to make it a crime for their nationals to travel or attempt to travel to a foreign state with the aim of perpetrating, planning, preparing, or participating in terrorist acts, or providing or receiving terrorist training.[5]

This article is intended to examine the possible applicability of certain Japanese legislation to the obligations flowing from the above resolution. In Japan, insufficient urgency is attached to addressing the problem of individuals who travel overseas to fight. That being said, the 2014 case of a Japanese university student who attempted to go to Syria to join IS forces[6] shows that Japan, albeit safer than other states (such as the UK and Australia), is not immune to the influence or impact of global terrorism.[7]

Chapter 1 FTFs and international law

1 UNSC Resolution 2178: A general framework against FTFs

The concept of "foreign fighters" is not a new one.[8] The Spanish Civil War, the war in Afghanistan following the 1989 Soviet invasion, the Bosnian conflicts in the 1990s, and the violence in Chechnya and Dagestan all attracted significant numbers of foreign fighters.[9] Foreign fighters have been a staple of many, if not most, armed conflicts, whether international or non-international, for many decades.[10]

Further, the impact caused by foreign fighters on hostilities cannot be overlooked since they appear to be responsible for many lethal attacks.[11] Malet

[5] Resolution 2178 (2014), UN Doc. S/RES/2178, in particular, para 6(a).

[6] The more detailed examination of this case will follow later in this article.

[7] During the deliberations of the Diet (Parliament of Japan), a lawmaker said approximately the following: the threat of IS is the threat that the world fears the most; there is concern that young people who left their own countries and have participated in the fighting for the sake of IS might proselytize and carry out brutal acts of terrorism against civilians when they return; are we prepared for terrorist acts by these returnees yet?, could we manage the risk? Mr. Shigeru Tanaka, member of the House of Councilors, Minutes of the Committee on Judicial Affairs, House of Councilors, 187th, No.2 (October 16, 2014), p. 29, at https://kokkai.ndl.go.jp/#/detail?minId=118713950X00220141016&spkNum=318&single.

[8] V. Bílková, "Foreign terrorist fighters and international law," *Groningen Journal of International Law*, Vol. 6, No.1 (October 2018), p. 1.

[9] S. Krähenmann, "Foreign fighters under international law," Academy Briefing No. 7 (October 2014), Geneva Academy of International Humanitarian Law and Human Rights, p. 3.

[10] OSCE/ODIHR, Guidelines, *supra* note 4, p. 11. See also M. Flores, "Foreign fighters involvement in national and international wars: A historical survey," in A. de Guttry *et al.* (eds.), *Foreign Fighters under International Law and Beyond* (TMC Asser Press, 2016), p. 27 *et seq.*

[11] E. Sommario, "The status of foreign fighters under international humanitarian law," in A. de Guttry *et al.* (eds.),

reminds us that "[a]lthough transnational insurgents comprised less than 10 per cent of the Iraqi resistance, they were responsible for more than 90 per cent of suicide bombings and high-lethality attacks."[12]

In any case, foreign fighting is not a new phenomenon. What is, however, new and unprecedented about foreign fighting today is, in addition to its scale, the fact that the phenomenon has been more frequently conceptualized through the prism of the fight against terrorism.[13]

Against the background of this foreign fighter mobilization, the terrorism threat associated therewith, and the rapid expansion of IS in Iraq and Syria, the UNSC adopted Resolution 2170 on August 15, 2014.[14] Acting under Chapter 7 of the Charter of the United Nations, the UNSC condemned the recruitment of so-called "foreign terrorist fighters" (FTFs)[15] by IS, Al Nusrah Front, and other entities associated with al-Qaeda,[16] and called upon Member States to take a series of measures to stop such recruitment.[17]

Further, on September 24, 2014, at a high-level summit chaired by then US President Barack Obama, the UNSC adopted Resolution 2178,[18] which focuses specifically, and virtually exclusively, on FTFs.[19] Resolution 2178 provides for a general regulatory framework to combat the above-mentioned phenomenon of FTFs.

Foreign Fighters under International Law and Beyond (TMC Asser Press, 2016), p. 142.

[12] D. Malet, *Foreign Fighters: Transnational Identity in Civic Conflicts* (Oxford University Press, 2013), p. 6

[13] Bílková, *supra* note 8, p. 1. Krähenmann noted fears that trained foreign fighters, experienced in handling weapons and explosives, might plan and carry out terrorist acts on return to their home countries, or set up new terrorist cells, recruit new members, or provide funds for terrorist acts or movements. Krähenmann, *supra* note 9, pp. 3, 12.

[14] Resolution 2170, UN Doc. S/RES/2170 (2014).

[15] The term "foreign terrorist fighter" first appeared in Resolution 2170 but remained undefined until Resolution 2178. J. Ip, "Reconceptualising the legal response to foreign fighters," *International and Comparative Law Quarterly*, Vol. 69 (January 2020), p. 107. In the article, he argues that the counterterrorism paradigm flowing from the resolution has certain shortcomings and that maintains an alternative paradigm based on neutrality law—the international law of neutrality and related domestic legislation—provides a better foundation than the predominant counterterrorism paradigm for dealing with issues of foreign fighting.

[16] Resolution 2170, *supra* note 14, para.7.

[17] To that end, the UNSC imposes duties on states: (1) to take national measures to suppress the flow of FTFs; (2) to bring FTFs to justice; and (3) to discourage individuals from travel to Syria and Iraq for the purposes of supporting or fighting with IS, ANF, or other entities associated with al-Qaeda. Operative paragraphs 5, 8, 9 (Resolution 2170). For a more detailed account of Resolution 2170, see S. Krähenmann, "The obligations under international law of the foreign fighter's state of nationality or habitual residence, state of transit and state of destination," in A. de Guttry *et al.* (eds.), *Foreign Fighters under International Law and Beyond* (TMC Asser Press, 2016), pp. 234–235.

[18] Resolution 2178, *supra* note 5. Japan was also one of the original proponents of the resolution.

[19] Bílková, *supra* note 8, p. 7.

2 Definition of FTFs in Resolution 2178

Resolution 2178 defines FTFs as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, *including in connection with armed conflict*" (emphasis added).[20] This definition serves as the basis for the whole regime against FTFs. Therefore, it is necessary here to mention some features in phrasing the resolution's definition. One such feature is the following six words in the definition: "including in connection with armed conflict." This language implies that some FTFs lack *any* connection to an armed conflict (emphasis added).[21] Thus, participation in and, indeed, the existence of an armed conflict is not required for an individual to qualify as an FTF.[22] As we shall see later, in operative paragraph 6 of Resolution 2178, the description of the conduct to be prevented and suppressed under the domestic laws of UN Member States does not contain any elements that would purport to limit their scope of application to an armed conflict context or to individuals trying to join an armed group.[23] In this sense, it is safe to say that the term "foreign terrorist fighter" in the resolution contemplates (or at least includes) individuals who have connections solely with terrorist acts despite the use of the term "fighter," which clearly conveys the idea that the person in question is the one who travels abroad to join an armed insurgency.[24]

The fact that the most prominent cases of foreign fighting in recent times have involved people leaving their home states to join Islamic terrorist groups has led to foreign fighting being conflated with (Islamic) terrorism.[25] In this way, Resolutions 2170 and 2178, both of which are intended to respond to the enormous upsurge of fighters traveling overseas for the purpose of joining IS and other terrorist organizations in Syria and Iraq, have indicated an explicit connection or linkage between foreign fighting and terrorism, by employing this unfamiliar term of "foreign terrorist fighter" (FTF).[26]

In any case, Resolution 2178 was the trigger for states to adopt domestic laws criminalizing FTFs. However, the term "terrorism" itself is not explained at all

[20] Resolution 2178, *supra* note 5, preambular paragraph 8. See also operative paragraphs 5 and 6(a) of the resolution.
[21] Krähenmann, *supra* note 17, p. 240.
[22] Bílková, *supra* note 8, p. 5.
[23] See Krähenmann, *supra* note 17, p. 240.
[24] Krähenmann, *ibid*. In fact, the cases of foreign fighting mentioned above as historical examples are not inherently linked to terrorism or terrorism-related activities.
[25] Ip, *supra* note 15, p. 106.
[26] *Ibid*.

in the resolution. Therefore, in combination with the conflation mentioned above, this could result in states crafting overbroad measures that have the potential to violate international law (including international human rights law).[27]

The following section discusses Japan's legal response to this offence of traveling abroad for terrorism.[28]

Chapter 2 Domestic legal response of Japan

1 Applicability of Article 93 of the Penal Code and the Terrorist Financing Act: From the deliberations in the Diet

It goes without saying that Japan is one of the Member States of the UN. This means that Japan is under an obligation to fulfill requirements imposed by Resolution 2178.[29] Several deliberations in the Diet (Parliament of Japan) have indicated how these requirements are implemented through domestic legislation. Discussions about the requirements of the resolution have been partly shaped by the deliberations around the revision of the "Act on Punishment of Financing to Offences of Public Intimidation" (hereinafter, "the Terrorism Financing Act").[30]

In one of the deliberations, a senior official of the Ministry of Justice responded to a question from a Member of Parliament as follows:

> Regarding legislation implementing Security Council 2178, we understand that Article 2(1) of the existing Terrorist Financing Act addresses a part of the obligations under the resolution. We also understand that its amendment may be in line with the purpose of addressing Resolution 2178, in the sense that the amendment enlarges the range of prohibited conduct to include indirect provision or collection of funds.[31]

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[27] See D.Webber, *Human Rights Law and Counter Terrorism Strategies: Dead, Detained or Stateless* (Routledge, 2022), pp. 162–163.

[28] Gherbaoui critically examines the criminalization obligation arising from Resolution 2178, calling it "the new criminal offence of travelling abroad for terrorism." T. Gherbaoui, "Criminalising foreign fighter travel in order to prevent terrorism in Europe: An illegitimate assault on human dignity?" in C. Paulussen and M. Scheinin (eds.), *Human Dignity and Human Security in Times of Terrorism* (T.M.C. Asser Press, 2019), p. 244.

[29] Resolution 2178 contains decisions of the UNSC that are legally binding for Member States pursuant to Article 25 of the UN Charter. They have no choice but to accept and carry out the decisions. Gherbaoui notes critically that "[t]he use of a Security Council Resolution to force the legislatures of all Member States to criminalise certain behaviour therefore challenges the sovereign equality of States as recognised in Article 2(1) of the UN Charter." Gherbaoui, *ibid*, p. 246.

[30] Act No. 67 of June 12, 2002. In this article, the English translation of Japanese legislation is based on "The Japanese Law Translation Project at the Ministry of Justice" (if not available, the translation is the author's), at http://www.japaneselawtranslation.go.jp/?re=02.

[31] Mr. Makoto Hayashi, Director-General of the Criminal Affairs Bureau at the Ministry of Justice, Minutes of the Committee on Judicial Affairs, House of Representatives, 187th Session, No. 5 (October 29, 2014), p. 5, at https://kokkai.ndl.go.jp/txt/118705206X00520141029/51. See also M. Takeuchi, "Implementing international norms to fight against terrorism: The 2014 amendment of the Act on the Punishment of Financing of Offences of Public Intimidation," *Japanese Yearbook of International Law*, Volume 58 (2015), p. 381.

Further, a senior official of the Ministry of Foreign Affairs made a statement on the same occasion to the effect that Article 93 of the Penal Code (Preparations or Plots for Private War) was also applicable to the requirements imposed by Resolution 2178, as well as the Terrorist Financing Act.[32]

In this way, the Japanese government indicated its position that the Terrorist Financing Act (as it was) and the amendment bill for the Act, in addition to Article 93 of the Penal Code (Preparations or Plots for Private War), could be used to respond to the obligations arising from Resolution 2178.

A similar understanding also had been shown in several other deliberations in the Diet.[33]

As noted above, the Japanese government held that these domestic legislative offences (including amendments) could be relevant to the various obligations imposed by Resolution 2178. Therefore, the following discussion will examine the relationship between the criminalization obligations under the resolution and these laws according to the following three categories:[34] (1) category 1: criminalization of FTFs travel; (2) category 2: criminalization of funding (provision and collection) for FTFs travel; and (3) category 3: criminalization of organization, or other facilitation, including recruitment, of FTFs travel

2 Category 1: Criminalization of FTFs travel

2-1) Article 93 of the Penal Code (Preparations or Plots for Private War)

Operative paragraph 6(a) of Resolution 2178 obliges the Member States to criminalize travel with the aim of "the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training." As mentioned above, Article 93 of the Penal Code (Preparations or

[32] Mr. Akira Kawano, Deputy Assistant Minister at the Ministry of Foreign Affairs, Minutes of the Committee on Judicial Affairs, House of Representatives, 187th Session, No. 5 (October 29, 2014), p. 5, at https://kokkai.ndl.go.jp/txt/118705206X00520141029/53.

[33] For instance, answers in the Diet by Mr. Takashi Uto, Parliamentary Secretary for Foreign Affairs, Minutes of the Committee on Foreign Affairs and Defence, House of Councilors, 187th Session, No.2 (October 16, 2014), p. 30, at https://kokkai.ndl.go.jp/#/detail?minId=118713950X00220141016&spkNum=326&single; answers in the Diet by Mr. Makoto Hayashi, Director-General of the Criminal Affairs Bureau, at the Ministry of Justice, Minutes of the Committee on Judicial Affairs, House of Councilors, 187th Session, No.6 (November 13, 2014), p. 22, at https://kokkai.ndl.go.jp/#/detail?minId=118715206X00620141113&spkNum=173&single.

[34] These categorizations are based on the idea contained in the following article: K. Hashimoto, "Iwayuru-Gaikokujinterosentoin(FTF)-Mondaieno-Keihoutekitaio-no-Kento (Criminalization of foreign terrorist fighters in Japan)," [in Japanese], *Hogaku Seijigaku Ronkyu: Journal of Law and Political Studies* (Keio University, School of Law), Vol.117 (2018. 6), p. 175, at https://koara.lib.keio.ac.jp/xoonips/modules/xoonips/detail.php?koara_id=AN10086101-20180615-0171. This article forms part of his recent monograph on criminal law (*Kokusaisoshikihanzai-Taisaku-niokeru-Keijikisei*[The Role of Criminal Law in Combating Transnational Organized Crime], Keio University Press, 2022), pp. 115–144(Chapter 5 of the book).

Plots for Private War) could be applicable to fulfilling this obligation.[35] It contains the following stipulation:

> A person who prepares or plots to wage war privately upon a foreign State shall be punished by imprisonment without work for not less than 3 months but not more than 5 years, provided, however, that the person who self-denounces shall be exculpated.[36]

The term "foreign State" in the article is interpreted as including even a state not officially recognized by the Japanese government but excludes any specific foreign organization or group.[37] To meet the requirement of "to wage war privately upon a foreign State," a certain kind of *organizational* use of force against a foreign state is needed (emphasis added). Therefore, it could be said that merely killing nationals of a foreign state is not enough to constitute waging war.[38]

Generally speaking, preparation means an act that is committed earlier than the commencement of the commission of a crime for the purpose of committing the crime and that substantially contributes to the commission of the crime.[39] Thus, as for this Article, preparations include, but are not limited to, the provision of weapons, ammunition, food, and funds; the recruitment and training of personnel; and the procurement of ships and aircraft for transportation.[40]

Further, a plot is generally understood to be the formation of an agreement by two or more persons to conspire to commit the crime in question.[41] As far as this Article is concerned, a plot has been interpreted as "a conspiracy or scheme by two or more individuals for the purpose of a fighting action made for a personal purpose."[42]

Therefore, assuming that Article 93 has to do with the criminalization obligation of FTFs travel, can the obligations arising from Resolution 2178 be fully implemented by that Article? Hereinafter, the author discusses cases in which a problem might arise.

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[35] See also Hashimoto, *supra* note 34, p. 178.

[36] Article 93 is placed in "Chapter IV Crimes Concerning Diplomatic Relations" in the Penal Code, at https://www.japaneselawtranslation.go.jp/en/laws/view/3581#je_pt2ch4at3. Despite some debate about the legal interests protected by Article 93, it has been argued forcefully that this Article protects the diplomatic action of the state. N. Nishida *et al.*, *Chushaku-Keihoh (Japanese Penal Code Annotated)*, [in Japanese], Vol.2 (Yuhikaku Publishing, 2016), p. 16.

[37] Nishida *et al.*, *ibid*., p. 17.

[38] *Ibid*; Hashimoto *supra* note 34, p. 179.

[39] N. Nishida *et al.*, *Chushaku-Keihoh (Japanese Penal Code Annotated)*, [in Japanese], Vol.1 (Yuhikaku Publishing, 2010), p. 649.

[40] H.Ohtsuka, *Dai-Konmentahru-Keihou (Extensive Commentary For the Penal Code)*, (Third Edition), [in Japanese], Vol.6 (Seirinshoin Publishing, 2015), p. 93; Hashimoto, *supra* note 34, p. 179.

[41] Nishida *et al.*, *supra* note 39, p. 650.

[42] Ohtsuka, *supra* note 40, p. 93; Hashimoto, *supra* note 34, p. 179.

2-2) Travel for the purpose of planning or preparing terrorist acts and providing or receiving terrorist training

As mentioned above, the subject of punishment under Article 93 of the Penal Code is preparations or plots committed to wage war privately upon a foreign state. If the obligations arising from operative paragraph 6(a) of Resolution 2178 banning a trip for "the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training" are to be fulfilled in a way that is consistent with the offences stipulated under Article 93, such acts of travel must at least be clearly for the purpose of "combat operations."[43]

Therefore, travel for "committing" or "participating in" terrorist acts (which could be referred to as "travel for the purpose of committing acts of fighting"), as described in operative paragraph 6(a), may be subject to punishment under Article 93. However, it is difficult to consider travel for the purpose of "planning" or "preparing" terrorist acts or "receiving or providing training for terrorist acts" (which could be referred to as "travel for the purpose of terrorist planning, etc."), as also described in operative paragraph 6(a), as containing a combat purpose. Thus, travel for the purpose of terrorist planning, etc., should not be considered within the reach of Article 93.[44]

2-3) Case study

Article 93 of the Penal Code had, until recently, never been applied since its enactment in 1907.[45] However, as mentioned above, one Article 93 case involved a Japanese university student who tried to travel to Syria to join IS. In that case, a 31-year-old former student at Hokkaido University, along with another man in his 20s, was referred to prosecutors for allegedly preparing to travel to Syria to join the IS militant group in 2014 during his student days.[46]

"I wanted to join IS and become a combatant," police quoted the former

[43] Hashimoto *supra* note 34, p. 179.

[44] *Ibid*.

[45] It is noteworthy that, precisely in the discussion touching on Resolution 2178, a senior government official responded as follows: "As far as I am aware, this is the first time we have conducted a mandatory investigation [according to Article 93]." (This statement was made in connection with the case of a university student.)
Mr. Mikio Shiokawa, Deputy Director General for Commissioner General's Secretariat of National Police Agency, Minutes of the Committee on Judicial Affairs, House of Representatives, 187th Session, No. 5 (October 29, 2014), p. 13, at
https://kokkai.ndl.go.jp/#/detail?minId=118705206X00420141024&spkNum=99&single.

[46] "Man, 31, referred to prosecutors over attempt to join Islamic State while at Hokkaido University", *The Japan Times*, July 3, 2019, at https://www.japantimes.co.jp/news/2019/07/03/national/crime-legal/man-referred-prosecutors-attempt-join-university/#.Xl72l6gzaUl; "5 men accused of plot to wage 'private war' for Islamic State", *The Asahi Shimbun*, English version, July 4, 2019 at https://www.asahi.com/ajw/articles/13060230.

Hokkaido University student as saying.[47] The above pair, along with three other suspects, believed to be involved in a plot to wage war privately, criminalized under Article 93 of the Penal Code, were referred to prosecutors on July 3, 2019.[48]

One of the other three suspects was Mr. Ko Nakata, 58, a researcher of Islam and former Doshisha University professor, who was suspected of communicating with IS members and preparing airline tickets to send the former student and the man in his 20s to Syria for combat purposes in August 2014, and another suspect was a freelance journalist named Mr.Kosuke Tsuneoka, 50, who under the instruction of Mr. Nakata, purchased three airline tickets for the above pair and himself, as he intended to accompany them to report on the story.[49]

The younger pair became involved in the plot after responding to a help-wanted ad advertising "Work location is Syria" at a used bookstore in the Akihabara district of Tokyo's Taito Ward. The pair, however, did not end up taking the trip.[50]

Police started to investigate the case after learning about the help-wanted ad. They then asked the former student to submit to voluntary questioning the day before his scheduled departure. The police also searched the homes of Mr. Nakata and Mr. Tsuneoka.[51]

On July 22, 2019, the Tokyo District Public Prosecutors Office announced that it would not prosecute the above five who had been referred to it on suspicion of violating Article 93 of the Penal Code. The reason for the decision, however, was not disclosed.[52]

3 Category 2: Criminalization of funding (provision and collection) for FTFs travel

3-1) General remarks

Operative paragraph 6(b) of Resolution 2178 mandates the domestic criminalization of the provision and collection of funds for travel with the aim of the "perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training." Offences under the Terrorist

[47] "5 men accused of plot to wage 'private war' for Islamic State," *ibid.*
[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.* Mr. Tsuneoka told a reporter of *The Asahi Shimbun* that the former student's passport had been stolen and that the mother of the man in his 20s had prevented him from flying. *Ibid.*
[51] *Ibid.* Mr. Tsuneoka told a reporter of *The Asahi Shimbun* that it was ridiculous to suppose that simply buying an airline ticket meant provoking a war in a foreign country. *Ibid.*
[52] "Suspected of plotting private warfare to join IS, the five not indicted finally," *The Asahi Shimbun,* Japanese version, July 23, 2019 (morning edition), p. 37.

Financing Act can be said to relate to the above obligations. An overview of this act, including its amendments, follows.

3-2) The Terrorist Financing Convention

The Diet enacted the Terrorist Financing Act in 2002 to implement the 1999 International Convention for the Suppression of the Financing of Terrorism (hereinafter, "the Terrorist Financing Convention").[53] The Terrorist Financing Convention, which was adopted at the initiative of France, forms the cornerstone of the fight against terrorism. It is intended to block the flow of terrorist funds without disrupting the circulation of capital and the continuation of business across global markets.[54] As its name indicates, the Terrorist Financing Convention is designed to criminalize acts of financing of terrorism that are not acts of terrorism themselves but could be considered the drivers of acts of terrorism. In this sense, it is the first counter-terrorism instrument that takes a proactive and preventive approach by criminalizing the financing of terrorism as a stand-alone preparatory offence and requiring states to freeze and forfeit funds used for or derived from the commission of terrorist acts.[55] Therefore, unlike the remaining UN counter-terrorism instruments, the Convention does not deal merely with specific acts of terrorism but is intended to suppress the financing of terrorism from a broader, more preventive point of view.[56]

3-3) The Terrorist Financing Act and its revision

The Terrorist Financing Act, which contemplates domestic implementation of the Terrorist Financing Convention, however, had been criticized in a report published by the Financial Action Task Force (FATF).[57] The mutual evaluation report of 2008 (hereinafter, the FATF report) indicated that the Act did not fully implement FATF Special Recommendation Ⅱ (SR. II) adopted in 2003 in that (1) the definition of "funds" in the Act was too limited; (2) the Act failed to

[53] Done at New York, December 9, 1999; entered into force, April 10, 2002. Entered into force in Japan on July 11, 2002.

[54] I. Bantekas, "The international law of terrorist financing," *American Journal of International Law*, Vol. 97, No. 2 (April 2003), p. 323.

[55] A. Sambei *et al.*, *Counter-terrorism Law and Practice: An International Handbook* (Oxford University Press, 2009), p. 278.

[56] *Ibid*.

[57] The nature and mandate of FATF are illustrated by FATF itself as follows: "The Financial Action Task Force (FATF) is the global money laundering and terrorist financing watchdog. The inter-governmental body sets international standards that aim to prevent these illegal activities and the harm they cause to society. As a policy-making body, the FATF works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. …The FATF reviews money laundering and terrorist financing techniques and continuously strengthens its standards to address new risks, such as the regulation of virtual assets, which have spread as cryptocurrencies gain popularity. The FATF monitors countries to ensure they implement the FATF Standards fully and effectively, and holds countries to account that do not comply." Available at https://www.fatf-gafi.org/about/

criminalize funds collection for terrorists by non-terrorists; (3) the Act left it unclear whether indirect funds provision or collection was covered; and (4) the Act did not make it explicitly clear whether funds provision or collection for a terrorist organization and individual terrorists for any purposes other than committing a terrorist act was criminalized.[58] Since then, FATF has urged Japan to improve this situation.[59]

As a result, the revision of the Terrorist Financing Act was completed in November 2014. Some of the details are explained below.[60]

3-4) Direct and indirect provision and collection of funds for FTFs travel

Operative paragraph 6(b) of Resolution 2178 requires Member States to criminalize "the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training."

How does Japan respond to the requirements imposed by this paragraph? As above, the Terrorist Financing Act could be applicable here.

First, Article 3(1) of the Act stipulates that "[a]ny person who, with the aim of facilitating the commission of an act of public intimidation, provides another who intends to commit it with funds or other benefits that may contribute to its commission, is to be punished by imprisonment for not more than 10 years or a fine of not more than 10,000,000 yen" (criminalization of a primary collaborator).

Second, the Act stipulates that "[a]ny person who, with the aim of facilitating

[58] FATF, "Third Mutual Evaluation Report: Anti-Money Laundering and Combating The Financing of Terrorism, Japan," October 17, 2008, pp. 45–48, at https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Japan%20full.pdf. See also Takeuchi, *supra* note 31, pp. 369–370.

[59] In a statement issued in June 2014, FATF expressed its concerns about Japan's continued failure to remedy the deficiencies identified in the FATF report. The statement also encouraged Japan to address these deficiencies promptly, including by adopting the necessary legislation. Available at https://www.fatf-gafi.org/countries/j-m/japan/documents/japan-aml-cft-deficiencies.html. See also Takeuchi, *supra* note 31, p. 370.

[60] Here the author would like to address point (1) above succinctly. Due to the criticism from FATF, the 2014 amendment to the Terrorist Financing Act changed and expanded the range of prohibited assets from "funds" only before the amendment to "other benefits" than funds, including, but not limited to, land, buildings, goods, and services that might facilitate the commission of acts of terrorism (for example, Article 2(1)). Thus, various types of support beyond purely financial support can be considered to fall within the scope of this law. For instance, information that serves to perpetrate terrorist acts may also fall into the category of "other benefits." Specific examples are information about how to break into an international airport (information about how to unlock a security system of the airport) and information about how to use weapons for a planned terrorist attack. Mr. Makoto Hayashi, Director-General of the Criminal Affairs Bureau at the Ministry of Justice, Minutes of the Committee on Judicial Affairs, House of Councilors, 187th Session, No.6 (November 13, 2014), p. 7, at https://kokkai.ndl.go.jp/txt/118715206X00620141113/44.

the commission of an act of public intimidation, provides another who intends to commit the offence prescribed under the preceding paragraph [meaning Article 3(1)] in connection with the act of public intimidation with funds or other benefits that may contribute to the commission of the act of public intimidation, is to be punished by imprisonment for not more than 7 years or a fine of not more than 7,000,000 yen" (Article 3(2))(criminalization of a semi-primary collaborator).

Third, the Act stipulates that "[a]ny person who, with the aim of facilitating the commission of the offence prescribed under paragraph (1) of the preceding Article [which means the offence by a primary collaborator stipulated in Article 3(1)], provides another who intends to commit it with funds or other benefits that may facilitate its commission, is to be punished by imprisonment for not more than 5 years or a fine of not more than 5,000,000 yen" (Article 4(1))(a secondary collaborator).

Furthermore, the provision or attraction of funds not covered by the above categories, while recognizing that such funds, etc., are to be used for the perpetration of terrorist acts, is also criminalized (Articles 5(1), (2)) (other collaborators).

As we have seen above, it can be argued that the Terrorist Financing Act, to which the 2014 revision added some additional provisions, broadly criminalizes the provision or collection of funds (and other benefits) in order to facilitate acts of terrorism in a way that went beyond the mere provision of funds (and other benefits) to terrorist plotters or the direct collection of funds by terrorist plotters. Therefore, the Act could be used to fulfill the obligation to criminalize the act of providing funds for such travel by a wide range of parties other than the terrorist plotter himself.[61]

[61] Hashimoto, *supra* note 34, p. 187. By way of additional comment, criminalizing the indirect provision of funds, etc., under Article 5 of the Act indicates that conduct at a preparatory stage would be criminalized, which raises the concern about enlarging the scope of prohibited conduct in an unlimited fashion. The government describes the safeguards against this enlargement as follows:

"A crime under Article 5 is established in a case where a person provides funds or attracts funds while being aware that the funds are to be used for the perpetration of an act of public intimidation.

Allow me to further explain the criteria to establish crimes under Article 5. First of all, at the point of providing funds, the possibility must exist that terrorist acts would actually be carried out for which those funds would be used. It is not sufficient that such terrorist acts are illusory. This is an objective aspect of the requirements.

It is further required that to establish crimes under Article 5, the person actually providing funds acknowledge at the point of perpetration the possibility that terrorist acts constituting crimes under Article 1 of the Act could be carried out, and also that funds to be provided could be used in some way for the perpetration of terrorist acts.

Thus, as crimes under Article 5 cannot be established unless all of these requirements are met, we understand that the scope of the crimes would not be expanded without limit." Mr. Makoto Hayashi, Director-General of the Criminal Affairs Bureau at the Ministry of Justice, Minutes of the Committee on Judicial Affairs, House of Councilors, 186th Session, No.23 (June 11, 2014), p. 14, at https://kokkai.ndl.go.jp/txt/118605206X02320140611/103. See also Takeuchi, *supra* note 31, p. 379.

3-5) Provision and collection of funds for travel for terrorism planning or training purposes, etc.

As mentioned above, the Terrorist Financing Act, through its revision in 2014, which enlarged punishable activities, is able to tackle "indirect" provision and collection of funds, etc., for terrorist purposes.

Resolution 2178 (operative paragraph 6(b)), however, also bans provision or collection of funds for a person who travels or intends to travel "for the purpose of …planning, or preparation of… terrorist acts, or the providing or receiving of terrorist training," which are acts that could not be interpreted as falling within the meaning of "an act of public intimidation" being criminalized under the Terrorist Financing Act.[62] As long as these acts (which could be termed "travels for terrorism planning or training," etc.) are interpreted as being not within the realm of "an act of public intimidation" of the Act, it is inarguable that the Terrorist Financing Act cannot fully respond to the requirements imposed by Resolution 2178 (as for its operative paragraph 6(b)).[63]

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[62] This is the case since specific activities that could be interpreted as terrorist acts enumerated in Article 1 of the Act exclude acts that could be regarded as involving the planning or preparation of terrorist acts, or the providing or receiving of terrorist training. Article 1 reads as follows:

"Article 1 For the purpose of this Act, 'an act of public intimidation' means any of the following criminal acts carried out with the aim of intimidating the public, national or local governments, or foreign governments and other entities (foreign national or local governments, or international organizations established pursuant to treaties or other international agreements):

(i) killing a person, causing bodily injury by using a weapon or any other means to cause serious bodily harm, kidnapping by force or enticement, or taking of hostages;

(ii)

(a) crashing, overturning, or sinking an aircraft in flight, or, by any other means, causing danger to its flight;

(b) sinking or overturning a ship in navigation, or, by any other means, causing danger to its navigation;

(c) seizing or exercising control at will over an aircraft in flight or a ship in navigation by act of assault or intimidation, or by any other way that causes an inability to resist;

(d) destroying or causing serious damage to an aircraft or a ship by detonating an explosive, arson, or any other means;

(iii) destroying or causing serious damage to any of the following by detonating an explosive, arson, or any other means that are likely to cause serious harm:

(a) a train, a motor-vehicle or other vehicle that is used for the transportation of persons or cargo and for official business or the benefit of the public, or a facility that is used for the operation of these vehicles (except for facilities that come under subparagraph (b));

(b) a road, a park, a station or similar facility that is used for the benefit of the public;

(c) a facility providing services such as electricity, gas, water, sewage, or communications services for official business or the benefit of the public;

(d) a facility producing, refining or processing, transporting, or storing materials such as oil, flammable natural gas, coal, nuclear fuel, or raw material thereof;

(e) a building (excluding facilities that come under any of subparagraphs (a) through (d)).".

[63] Hashimoto, *supra* note 34, p. 187.

4 Category 3: Criminalization of organization, or other facilitation, including recruitment, of FTFs travel

Resolution 2178 calls on Member States to adopt a multi-layered approach to regulating FTFs issues, and its operative paragraph 6(c) targets the organization, or other facilitation, including acts of recruitment, of FTFs travel:

> The willful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training.

By way of additional comment, Article 3(1) of the Terrorist Financing Act (after the revision) punishes any person who, with the aim of facilitating the commission of an act of terrorism, provides a terrorist plotter with funds or other benefits (meaning benefits other than funds including, but not limited to, land, building, goods, and services…) that may contribute to its commission.[64]

A typical interpretation of "goods and services" would include weapons used in terrorist acts and instruction in how to use these weapons. Furthermore, as noted above, giving information about a route of entry to critical facilities (e.g., an international airport or a nuclear power plant) constitutes "other benefits" too.[65]

In light of this, we can safely say that, depending on the meaning of the organization or other facilitation (including acts of recruitment) concerning FTFs travel, the crimes under the Terrorist Financing Act would be able to respond to, to some extent, the criminalization obligation imposed by operative paragraph 6(c) of Resolution 2178.[66]

Concluding observations

The preceding is a discussion of some of the issues that may arise when Japan as a UN Member State implements the FTFs-related criminalization obligations mandated by Resolution 2178 (focusing mainly on operative paragraph 6) in terms of the relationship with the offences stipulated in Article 93 of the Penal Code (Preparations or Plots for Private War) and the Terrorist Financing Act.[67]

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[64] In accordance with this article, the sentence shall be imprisonment for not more than 10 years or a fine of not more than 10,000,000 yen.

[65] See also Hashimoto, *supra* note 34, p. 192.

[66] Hashimoto, *ibid*.

[67] In addition to the two laws reviewed in this article, "the Act on Punishment of the Preparation of Acts of Terrorism and Other Organized Crimes" of 2017 might have some relevance to Resolution 2178. On this point,

Some of the criminalization obligations under the resolution clearly fall within the various acts punishable by the above national legislation.[68]

However, where the purpose of travel is not to fight or commit terrorist acts, but to plan or prepare for terrorist acts or to give or receive training for terrorist acts (travels for terrorism planning or training purposes, etc.), certain questions may arise as to whether these national laws can adequately implement criminal obligations arising from Resolution 2178.[69]

The threat of terrorism must be urgently addressed. That being said, it should always be recalled that " …the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits."[70]

see K. Ishibashi, "Enactment of the Amended Act on Punishment of Organized Crimes and Control of Crime Proceeds (also referred to as "the Act on Punishment of the Preparation of Acts of Terrorism and Other Organized Crimes"), *Asian Yearbook of International Law*, Volume 23 (2017), pp. 255–262; Hashimoto, *supra* note 34, pp. 194–195.

[68] Hashimoto, *ibid*., p. 193. However, for an example of an academic who expresses skepticism about the implementation of Resolution 2178 through the laws considered in this paper, see H. Nagata, "Shisenyobiinbozai-no- Seiritsuyoken" (On the requirements for establishing the crime of preparations or plots for private war), [in Japanese], *Soka Hogaku* (Soka University, School of Law), Vol. 44 (December 2014), pp. 31–58, at https://soka.repo.nii.ac.jp/?action=pages_view_main&active_action=repository_view_main_item_detail&item_id=36250&item_no=1&page_id=13&block_id=68.

[69] Hashimoto, *supra* note 34, p. 193.

[70] Declaration of Judge Buergenthal, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, *I.C.J. Reports 2004*, at https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-05-EN.pdf. This passage should be noted now more than ever in light of the recent shift in the legal regulation of terrorism toward the regulation of the preparatory stage before the core activities of committing a crime. See, in addition to Ip's article (*supra* note 15), C. Walker *et al.* (eds.), *Precursor Crimes of Terrorism: The Criminalisation of Terrorism Risk in Comparative Perspective* (Edward Elger, 2022).